Supreme Court, U.S.
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No. 97-___

In The

Supreme Court of the United States

October Term, 1997

MESCAL BLANCHARD BROWN,

Petitioner,

v.

FORD MOTOR COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The Louisiana State Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether due process requires that the two-pronged test for obtaining a new trial expressed in *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984) applies to state courts faced with allegations that a juror has lied during *voir dire*.

PARTIES TO THE PROCEEDINGS

All parties to the proceeding below are listed in the caption, except for State Farm Mutual Automobile Insurance Company.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 7

CONCLUSION 11

APPENDICES

Appendix A: Judgment of the Trial Court, dated March 27, 1995 ..... App. 1

Appendix B: Opinion of Louisiana First Circuit Court of Appeal, dated September 19, 1997 ..... App. 4

Appendix C: Opinion of the Louisiana State Supreme Court, dated January 9, 1998 ..... App. 26

Appendix D: Affidavit of Roger Phillips ..... App. 28

Appendix E: Lawsuit filed against Mark Allement ..... App. 30

Appendix F: Pertinent portions of transcript of *voir dire* of Mark Allement ..... App. 53

Appendix G: Affidavit of Robert E. Kleinpeter .. App. 62

TABLE OF AUTHORITIES

Page

CASES

Brown v. Hudson, 700 So.2d 932 (La.App. 1st Cir. 1997) 1

Lee v. K-Mart Corp., 483 So.2d 609 (La.App. 1st Cir. 1985), writ den., 484 So.2d 661 (1985) 9

McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984) 6, 7, 8, 10, 11

Rivas v. Brattesani, 94 F.3d 802 (2nd Cir. 1996) 7, 10

United States v. Scott, 854 F.2d 697 (5th Cir. 1988) 8

Vezina v. Theriot Marine Service, 610 F.2d 251 (5th Cir. 1980) 7, 10

OTHER AUTHORITY

28 U.S.C. 1257 1

U.S. Constitution, Amendment 5 ..... 2, 7

U.S. Constitution, Amendment 14 ..... 2, 7, 11

LSA-C.C.P. art. 1765(2) 9

PETITION FOR A WRIT OF CERTIORARI

Mescal Blanchard Brown respectfully petitions this Court for a writ of certiorari to review the judgment of the Louisiana State Supreme Court, dismissing petitioner's application for a writ of certiorari or review to the Louisiana Court of Appeal for the First Circuit on January 9, 1998.

OPINIONS BELOW

The opinion of the Louisiana Court of Appeal for the First Circuit is reported at *Brown v. Hudson*, 700 So.2d 932 (La.App. 1st Cir. 1997) and is reprinted in the appendix hereto ("App.") at 4. The opinion of the Louisiana Supreme Court is not reported but is reprinted in the appendix hereto at 26.

JURISDICTION

The Louisiana Supreme Court denied the petitioner's application for writ of certiorari on January 9, 1998. App. at 26. No request for a rehearing was made. State rules do not allow requests for rehearing after denial of the writ. There was no cross-petition for a writ of certiorari. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257.

CONSTITUTIONAL PROVISIONS

AMENDMENT FIVE

. . . nor be deprived of life, liberty or property, without due process of law; . . .

AMENDMENT FOURTEEN

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The case as brought below began as a complicated multi-vehicle collision with numerous parties and ended as a simple products liability case against Ford Motor Company. On July 21, 1991, a party barge and trailer separated from its tow truck, crossed the center line, collided first with a 1984 Lincoln Town Car driven by Mrs. Mescal Brown, and then came to rest on top of a following vehicle driven by Allie Pogue and occupied by his wife, Mrs. Janie Pogue. Mrs. Brown suffered devastating injuries in the accident, including permanent brain damage leaving her permanently incapacitated, loss of sight in both eyes, loss of an ear and hearing and numerous other disabling injuries. Mrs. Brown is completely and totally disabled, and requires round the clock care. The Brown and Pogue families filed separate suits in

September, 1991, against the truck's driver, owner, and several insurers. The suits were consolidated for discovery and trial. Subsequent amendments named additional defendants. Ultimately, Mrs. Brown sued five classes of defendants – (1) the driver of the truck; (2) the driver's father who had set up the towing arrangement; (3) several young men who assisted in actually loading the barge and trailer; (4) the individual and corporate hosts of the party at which the barge was used; and (5) Ford Motor Company, the manufacturer of the seatbelt in Mrs. Brown's Town Car.

The jury was selected in March, 1995, but opening statements did not begin until December 4, 1995. A series of settlements began a few days prior to opening statements and was completed early on the fifth trial day. These settlements dismissed the entire Pogue case and all but Ford in Mrs. Brown's case. Mrs. Brown and Ford then tried the seatbelt defect case for five days. The jury returned its 9-3 verdict on December 14, 1995, finding that no defect existed in the Ford seatbelt. Since defect was the initial jury interrogatory, the jury did not answer questions relating to causation, fault apportionment, and damages. Judgment pursuant to this verdict was filed on December 29, 1995. Mrs. Brown timely filed motions for new trial and/or JNOV, partially based on a very disturbing post-trial discovery concerning the jury foreman. The Trial Court denied these motions on March 27, 1996. In the process, it struck several pieces of evidence relating to jury misconduct and further struck petitioner's entire memorandum even though only a small portion concerned the stricken evidence.

The petitioner then filed an appeal with the Court of Appeal for the First Circuit. The First Circuit affirmed the Trial Court on September 19, 1997, in a split decision, with one judge concurring in the opinion. The Louisiana Supreme Court denied the application for writ of certiorari or review on January 9, 1998.

The issue before this Court involves the actions of the jury foreman and the impact of those actions upon the verdict itself. During *voir dire*, the prospective juror, Mark Allement, lied to the Court about his prior involvement with the civil justice system. During the first three days of jury selection in March of 1995, Allement sat in the courtroom and listened to 32 different members of the jury venire answer the key inquiry concerning prior lawsuit experience. He heard nine explain suits they or a family member had brought; he heard three describe prior experiences as defendants, and he even heard one of the defense attorneys inform everyone that the attorney was representing one of the other juror's family in an accident unbeknownst to her. Then, when it came Mr. Allement's turn to disclose prior litigation, he testified:

> Q. How about any lawsuits, anything of that sort? Have you – have you ever been involved in any lawsuits –
>
> A. Uh.
>
> Q. or have you ever sued anybody or been sued?
>
> A. No, sir.

Q. Same with your wife?

A. Not that I know of.

App. at 47.

The disclaimer of prior litigation was absolutely untrue. Only four and one-half years earlier, Mr. Allement had been sued for both compensatory and exemplary damages in connection with an accident bearing many similarities to that of Mrs. Brown. App. at 30 *et seq.* In Allement's case, he was sued for driving his car into a young boy on a bicycle. He was allegedly drunk while behind the wheel of his vehicle. This was not an accident which anyone would forget. For example, Allement contemplated taking the testimonial privilege against self-incrimination in his deposition. He faced personal exposure for the exemplary aspect of that claim. The suit was settled. He did understand the question, because Allement did testify accurately that his father had been sued over an escaped cow.

After swearing falsely, Allement heard the prior litigation question posed to eight other members of the venire and did not try to correct his misstatement. He then went home after taking the juror oath and returned to his normal life for eight months knowing that he would spend the two weeks before Christmas hearing evidence in Mrs. Brown's case against Ford Motor Company. When he returned, he did not try to correct his misstatement. He re-entered the courtroom on December 4, ready to hear opening statements and did not try to correct his misstatement. He did not try to correct it at any time during the two-week trial. After the jury retired, he was elected jury foreman. The jury returned a verdict

finding that the seatbelt was not defective by a 9-3 margin, the bare minimum necessary for a jury finding. Mr. Allement, foreman of the jury, controlled the jury verdict form and voted against liability by Ford.

Allement's actions would not have been discovered had it not been for an investigator for the petitioner who saw Allement and informed petitioner's counsel that he had served process on Allement in the earlier lawsuit. Petitioner moved for a New Trial or a Judgment Notwithstanding the Verdict. The Trial Court denied the motion and struck petitioner's memorandum and the investigator's affidavit.

The issue before this Court involves the jury selection process in a civil case. If a juror lies during *voir dire*, and that lie has a substantial impact on the case, should the verdict be overturned? In the application to the Louisiana Supreme Court, the petitioner cited *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984) as support for his proposition that a juror's failure to disclose a material fact does not entitle the plaintiff to a new trial unless the juror's failure to disclose denied him his right to an impartial jury. The constitutional issue of the right to a fair trial was denied, if the jury was not impartial, under the theory espoused in *McDonough*. Should the decision in *McDonough* be applied to state court proceedings? In other words, does the holding in *McDonough* arise to constitutional considerations, applicable to the states? The Louisiana court denied writs, so there was no decision on that matter.

REASONS FOR GRANTING THE WRIT

The Louisiana Supreme Court refused to consider the denial of due process to the petitioner in this case. The question of whether the perjury committed by the juror who eventually became the foreman of a jury which decided the liability of the defendant in a 9-3 decision is apparently a case of first impression in the federal system. The right to a fair trial does apply to parties in a civil proceeding. U.S. Constitution, Amendment 5; U.S. Constitution, Amendment 14; *Rivas v. Brattesani*, 94 F.3d 802, 807 (2nd Cir. 1996); see also *Vezina v. Theriot Marine Service*, 610 F.2d 251 (5th Cir. 1980). If the *McDonough* decision applies to a state civil proceeding, then the Louisiana Trial Court had a duty to consider those factors in making its decision on the Motion for a New Trial. Further, had the Trial Court taken the constitutional rights of the petitioner into consideration and applied the *McDonough* factors, then the Court would have had no choice but to grant a new trial. The juror lied on an issue which was material to the issues before the jury. Had the petitioner known of the juror's position as a defendant in a similar suit, the petitioner would have used a challenge, either peremptory or for cause, to excuse the juror. The jury made its decision in a 9-3 decision, the minimum required by state law for a valid verdict. That juror made a difference in the final verdict. Petitioner was denied a fair trial.

LEGAL ARGUMENT

The Petitioner was denied her constitutional right to a fair trial when the Trial Court failed to grant a New Trial upon a showing that the foreman of the jury had lied in *voir dire* on a material fact and that the jury rendered a verdict in a 9-3 decision.

The majority opinion of the Louisiana First Circuit Court of Appeal upheld a verdict based upon the deciding vote of a jury foreman who conceals his prior accident and exemplary damage litigation experience in *voir dire* despite questions specifically directed to him. This situation would require a new trial under the test articulated by the United States Supreme Court in *McDonough Power Equipment, Inc. v. Greenwood,* 464 U.S. 548, 104 S. Ct. 845, 78 L.Ed.2d 663 (1984) and specifically applied by the United States Fifth Circuit in *United States v. Scott,* 854 F.2d 697 (5th Cir. 1988). The Louisiana appellate court applied a case by case standard in its decision.

In *McDonough,* 464 U.S. at 556, Chief Justice Rehnquist, balancing the need for finality against the right to an impartial jury, articulated a two-part test for determining at what point *voir dire* concealment requires a new trial:

> We hold that to obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire,* and then further show that a correct response would have provided a valid basis for a challenge for cause.

The petitioner herein clearly showed in her application for a new trial sufficient evidence to support a hearing on the motion. App. at 28. The indication that

Allement had lied was not disputed by any party. Therefore, the petitioner demonstrated that a juror failed to answer honestly a material question on *voir dire*.

Secondly, the petitioner meets the second part of the *McDonough* test which asks whether a correct response would have been the basis for a valid challenge for cause.[1] obviously, Mrs. Brown could have *based* a valid cause challenge on the reasonable belief that the foreman was biased because he had been sued in a similar situation. LSA-C.C.P. art. 1765 (2).[2] Even more significantly, the challenge would not only have had a valid basis, it would have been granted, in light of both the trial court's other cause decisions in this case and a prior decision of the very judges in this case. The lower court readily granted cause challenges due to attitudes about the tort system. For example, one juror was excused because she believed people should not sue. Moreover, in *Lee v. K-Mart Corp.*, 483 So.2d 609 (La.App. 1st Cir. 1985), writ

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[1] The first stage of the *McDonough* test requires that there be a dishonest answer to a *material* question. The materiality requirement is subsumed within the second stage since information forming the basis of a cause challenge is material and *vice versa*.

[2] That provision states in pertinent part as follows:

Art. 1765. Challenges for cause

A juror may be challenged for cause based upon any of the following:

. . .

(2) When the juror has formed an opinion in the case or is not otherwise impartial, the cause of his bias being immaterial;

. . .

den., 484 So.2d 661 (1985), Judge Fogg, then on the District Court, refused a cause challenge to the defense (who then exhausted a peremptory) based on the prior accident of a juror's wife. The appellate court reversed in an opinion holding that the prior accident justified a cause challenge even though the juror believed he could be impartial. The situation is aggravated in this case since the foreman's concealment prevented further inquiry upon which Mrs. Brown could have based a cause or even a peremptory challenge.

Finding that this case meets the requirements of *McDonough*, the next inquiry should be whether the *McDonough* requirements are applicable to this case. *McDonough*, after all, is a diversity matter to which the Federal Rules of Civil Procedure applied. Does the constitutional right to a fair trial require the *McDonough* rule?

The right to due process of law does require a fair trial. *Rivas v. Brattesani*, 94 F.3d 802, 807 (2nd Cir. 1996); see also *Vezina v. Theriot Marine Service*, 610 F.2d 251 (5th Cir. 1980).

> This [Supreme] Court has long held that '[a litigant] is entitled to a fair trial but not a perfect one,' for there are no perfect trials.

McDonough, supra, at 552, 104 S. Ct. at 848.

The *McDonough* court then went on to find that the standards for a fair trial in a case of juror perjury required the two-pronged test identified above. Due process requires that a civil litigant be accorded a fair trial, if not a perfect trial. The test in *McDonough* provides a constitutional framework to be applied when and if an allegation of juror misconduct is the basis for a Motion

for a New Trial. That test should be applied to the states through the Fourteenth Amendment to the United States Constitution.

Because this case meets the *McDonough* test, a writ should issue to the Louisiana State Supreme Court, ordering it to overturn the decision of the Trial Court and the First Circuit Court of Appeal and remand the case to the District Court for a New Trial.

CONCLUSION

Our founding fathers based our constitutional rights on the basic premises of "absolute truth," and incorporated that belief in the provisions upon which this Writ of Certiorari is based. The question of truth has been the cornerstone of our democracy and our world-acclaimed judicial system for over two hundred years. If we ignore the right of a litigant to a fair and impartial trial at the commencement of his or her judicial proceeding, denying her attorney the ability to choose a fair and impartial jury, we undermined the process and make the remainder of the proceedings worthless in terms of their relation to the basic premise of truth, worthless not just to Mescal Brown, but to all litigants who seek justice in the American Judicial System.

Pontius Pilate asked the question of the ages before Jesus Christ when he asked the question, "What is truth." Somehow Pilate inferred the idea that truth was a subject rather than an absolute and objective fact. The oath that Mark Allement took as a juror in answering the *voir dire* questions is one based upon God's absolute truth. Mark

Allement lied, he did not tell the truth. This is an absolute undisputable fact. To deny Mescal Brown a new trial is to say to the Mescal Browns of the American Judicial System that truth does not matter. To deny this Writ will have a truly chilling effect on the judicial system that all citizens of this nation rely on to decide their legal issues. It will likewise send a message across this land that jury members' oaths to God to tell the truth are unimportant. Therefore, their promise to tell the truth based upon God's absolute truth is unimportant. This oath to tell the truth is the premise upon which the judicial system relies for the party litigants to receive an impartial and fair trial. That did not occur in the instant case.

For the foregoing reasons, the petition for a writ of certiorari should be granted and the judgment of the Louisiana State Supreme Court and accordingly the Louisiana First Circuit Court of Appeal reversed.

Respectfully submitted,

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APPENDIX A

18TH JUDICIAL DISTRICT COURT
FOR THE PARISH OF POINT COUPEE
STATE OF LOUISIANA

No. 26,504 DIVISION "D"

JANIE LIND POGUE AND ALLIE R. POGUE,
INDIVIDUALLY AND AS ADMINISTRATOR OF
THE ESTATE OF HIS MINOR CHILDREN,
GREGORY A. POGUE AND ELIZABETH L. POGUE

VERSUS

TAMELA D. HUDSON, RUDOLPH HUDSON,
SHELTER MUTUAL INSURANCE COMPANY,
STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY AND STATE OF LOUISIANA,
THROUGH DEPARTMENT OF TRANSPORTATION
AND DEVELOPMENT

CONSOLIDATED WITH

18TH JUDICIAL DISTRICT COURT
FOR THE PARISH OF POINTE COUPEE
STATE OF LOUISIANA

NO. 26,505 DIVISION "D"

MESCAL BLANCHARD BROWN, THOMAS A. BROWN
AND GLORIA BROWN SEELY

VERSUS

TAMELA D. HUDSON, RUDOLPH HUDSON,
SHELTER MUTUAL INSURANCE COMPANY,
STATE FARM INSURANCE COMPANY,
FORD MOTOR COMPANY AND SCOTTSBORO
MACHINE & TOOL, INC.

FILED:_____ _____

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JUDGMENT

After fully considering the briefs and oral argument of plaintiffs, Mescal Blanchard Brown and Thomas A. Brown, Individually and in his capacity as attorney-in-fact for Mescal Blanchard Brown, and defendant, Ford Motor Company ("Ford"), regarding plaintiffs' Motion for Judgment Notwithstanding the Verdict Or, In the Alternative, For a New Trial and Ford's Motion to Strike Affidavit of Roger Phillips and Memorandum in Support of Motion for Judgment Notwithstanding the Verdict Or, In the Alternative, For a New Trial;

IT IS ORDERED, ADJUDGED AND DECREED the Ford's Motion to Strike Affidavit of Roger Phillips and Memorandum in Support of Motion for Judgment Notwithstanding the Verdict Or, In the Alternative, For a New Trial, is GRANTED; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court finds no errors in the jury's factual findings, and accordingly, plaintiffs' Motion for Judgment Notwithstanding the Verdict Or, In the Alternative, For a New Trial is DENIED.

New Roads, Louisiana this 27th day of March, 1996.

/s/ Jack Marionneaux
JUDGE

PLEASE SERVE:

Mescal Blanchard Brown and Thomas A. Brown, Individually and in his capacity as attorney-in-fact for Mescal Blanchard Brown, through their attorney of record: Robert E. Kleinpeter, Esq.

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APPENDIX B

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700 So.2d 932, 96 2087 La.App. 1 Cir. 9/19/97, Brown v. Hudson, (La.App. 1 Cir. 1997)

700 So.2d 932

96 2087 La.App. 1 Cir. 9/19/97

Mescal Blanchard BROWN, Thomas A. Brown and Gloria Brown Seely

v.

Tamela D. HUDSON, Rudolph Hudson, Shelter Mutual Insurance Company, State Farm Insurance Company, et al.

No. 96 CA 2087.
Court of Appeal of Louisiana,
First Circuit.
Sept. 19, 1997.

Robert E. Kleinpeter, Jay G. McMains, Baton Rouge, for Plaintiff-Appellant Mescal Brown.

Michael T. Pulaski, Robert W. Maxwell, J. Jeff Raborn, New Orleans, for Defendant-Appellee Ford Motor Co.

Before LOTTINGER, C.J., and SHORTESS and FOGG, JJ.

LOTTINGER, Chief Judge.

The accident which gave rise to plaintiff's cause of action resulted when a party barge and trailer came loose from its tow truck, crossed the center line of the roadway, collided with a Lincoln Town Car driven by plaintiff, and proceeded thereafter to strike a second vehicle.

Numerous defendants were named in the ensuing litigation; however, by the midpoint of the trial, all claims had been settled with the exception of plaintiff's product liability claims against Ford Motor Company. From a jury verdict finding that no defect existed and a subsequent denial of her motions for new trial and/or JNOV, plaintiff now appeals.

FACTS

On or about July 21, 1991, at approximately 6:25 p.m., plaintiff, Mescal Blanchard Brown (hereafter, Mrs. Brown), was driving her 1984 Lincoln Town Car manufactured by Ford Motor Company in a northerly direction on La. Hwy. 1 near its intersection with La. Hwy. 416 in Pointe Coupee Parish. Defendant Tamela D. Hudson (hereafter, Ms. Hudson) was operating a 1983 Ford Pickup truck, owned by her father, defendant Rudolph Hudson, in a southerly direction on La. Hwy. 1. The truck was pulling a trailer loaded with a 24-foot Starcraft pontoon boat or "party barge," both of which were owned by Ms. Hudson.

The accident occurred when the boat and trailer became disengaged from the truck and drifted from the southbound lane into the northbound lane of La. Hwy. 1, striking the vehicle driven by Mrs. Brown. The impact of this collision caused Mrs. Brown's vehicle to leave the roadway to the right and travel approximately 180 yards before striking a tree at the edge of False River. The boat and trailer thereafter collided with a second vehicle following immediately behind the Brown vehicle which was occupied by Allie R. and Janie Lind Pogue.

Mrs. Brown and Mrs. Pogue both sustained very serious injuries. As a result of injuries received in this accident, Mrs. Brown was rendered blind, horribly disfigured, mentally deficient, and incapable of performing the simplest of daily activities. The Brown and Pogue families filed separate suits against various defendants in September, 1991. These suits were subsequently consolidated for discovery and trial. Additional defendants were later named through amendments to the pleadings. Ultimately, five classes of defendants were sued – (1) the driver of the truck; (2) the driver's father who owned the truck; (3) several young men who assisted in attaching the trailer and the loading of the barge; (4) the host of the party at which the boat was used, together with the corporation which owned the camp at which the party was held; and (5) Ford Motor Company, the manufacturer of the seat belt system in Mrs. Brown's Lincoln Town Car.

In early 1995, Mrs. Brown's children, namely, Thomas Brown and Gloria Brown Seely, moved to voluntarily dismiss and waive their claims for loss of consortium with their mother.[1] During the course of the trial, all claims were settled with the exception of Mrs. Brown's claims against Ford Motor Company.

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[1] The record reflects that Mrs. Brown's children, Thomas Brown and Gloria Brown Seely, initially asserted claims for damages as a result of their loss of consortium, society and companionship of their mother and travel expenses incurred by Gloria Brown Seely in order to provide care to her mother.

ACTION OF THE TRIAL COURT

The jury, in a nine to three decision, concluded that the Lincoln's restraint system was not defective. The initial question on the verdict form addressed the issue of the alleged defect in the restraint system. Since the jury concluded that no such defect existed, issues of causation, allocation of fault and damages were never considered. Thereafter, Mrs. Brown timely filed motions for judgment notwithstanding the verdict, or in the alternative, for a new trial based in part on her post-trial discovery that the jury foreman had failed to disclose certain facts during questioning on voir dire. The trial court denied plaintiff's motions and this appeal followed.

ISSUES ON APPEAL

On appeal, Mrs. Brown assigns the following errors:

1. The trial court erred in refusing to void the jury verdict due to misconduct by the jury foreman;

2. The jury's finding of no defect is manifestly erroneous since Ford's sole witness on defect agreed that the restraint system operated contrary to the owner's manual thereby rendering it defective;

3. The trial court erred in allowing the jury to decide the issue of defect;

4. The trial court erred in directing a verdict on breach of an express warranty; and

5. The trial court erred in directing a verdict on redhibition [sic].

Mrs. Brown asserts that in light of the foregoing errors, this court is required to void the verdict returned by the jury in the trial court and conduct a de novo review of this matter.

LAW AND DISCUSSION

Juror Misconduct

In her first assignment of error, Mrs. Brown asserts that the trial court committed legal error in refusing to void the jury verdict due to misconduct by the jury foreman. Specifically, Mrs. Brown claims that the juror in question, who was later elected foreman, intentionally failed to disclose during voir dire questioning that he had been named as a defendant in a personal injury lawsuit filed four and a half years earlier. Mrs. Brown emphasizes that this omission takes on added significance considering the juror's status as foreman, coupled with the fact that a poll of the jury revealed that he sided with the majority in the 9 to 3 verdict of no defect.[2]

Under Louisiana law, not every instance of jury or juror misconduct necessitates the granting of a new trial or the remand of a case for a new trial. *Gormley v. Grand Lodge of State of Louisiana*, 503 So.2d 181 (La.App. 4th Cir.), *writ denied*, 506 So.2d 1227 (La.1987); *Bossier v. DeSoto General Hospital*, 442 So.2d 485 (La.App. 2nd Cir. 1983), *writ denied*, 443 So.2d 1122 (La.1984). The trial judge has much discretion in determining whether to

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[2] Pursuant to the provisions of La.Code Civ. P. article 1795, nine is the minimum of jurors who must concur to reach a verdict.

grant a motion for a new trial. *Belle Pass Terminal, Inc. v. Jolin, Inc.*, 92-1544 (La.App. 1st Cir. 3/11/94), 634 So.2d 466, *writ denied*, 94-0906 (La.6/17/94), 638 So.2d 1094, *reconsideration denied*, 94-0906 (La.7/1/94), 640 So.2d 258, *reconsideration denied*, 94-0906 (La.9/16/94), 642 So.2d 185. Instead, the burden falls upon the mover to prove that the level of the behavior was of such a grievous nature as to preclude the impartial administration of justice. *Uriegas v. Gainsco*, 94-1400 (La.App. 3rd Cir. 9/13/95), 663 So.2d 162, *writ denied*, 95-2485 (La.12/15/95), 664 So.2d 458; *Gormley v. Grand Lodge of State of Louisiana*, 503 So.2d 181 (La.App. 4th Cir.), *writ denied*, 506 So.2d 1227 (La.1987); *Bossier v. DeSoto General Hospital*, 442 So.2d 485 (La.App. 2nd Cir. 1983), *writ denied*, 443 So.2d 1122 (La.1984).

A decision to deny a motion for new trial based upon jury misconduct is reviewed pursuant to an abuse of discretion standard. *Wright v. Hirsch*, 560 So.2d 835 (La.1990). La.Code Civ. P. article 1972 sets forth the peremptory grounds for a new trial and provides in pertinent part that "[a] new trial shall be granted, upon contradictory motion of any party, in the following cases: . . . (3) When the jury was bribed or has behaved improperly so that impartial justice has not been done." Improper behavior by a juror or jury is not defined and must be determined by the facts and circumstances of each particular case. *Uriegas v. Gainsco*, 94-1400 (La.App. 3rd Cir. 9/13/95), 663 So.2d 162, *writ denied*, 95-2485 (La. 12/15/95), 664 So.2d 458; *Bossier v. DeSoto General Hospital*, 442 So.2d 485 (La.App. 2nd Cir. 1983), *writ denied*, 443 So.2d 1122 (La.1984).

A review of Louisiana jurisprudence relative to juror or jury misconduct reveals that the courts of this state

have been reluctant to set aside jury verdicts based upon allegations of improper behavior. Innocuous conversations between jury members and an interested party or his attorney during the course of trial have been held not to constitute improper behavior absent a showing of prejudice. See, *Lejeune v. Union Pacific Railroad*, 96-294 (La.App. 3rd Cir. 3/12/97), 693 So.2d 804; *Searle v. Travelers Insurance Company*, 557 So.2d 321 (La.App. 4th Cir. 1990); *Peters v. Atlanta International Insurance Company*, 469 So.2d 421 (La.App. 3rd Cir.), *writ denied*, 474 So.2d 949 (La.1985); *Kollet v. Baggot*, 400 So.2d 1085 (La.App. 1st Cir. 1981). Similarly, simple contact between court personnel and jurors during deliberations has been deemed insufficient for the granting of a new trial. See, *Parker v. Centenary Heritage Manor Nursing Home*, 28401-CA (La.App. 2nd Cir. 6/26/96), 677 So.2d 568, *writ denied*, 96-1960 (La.11/1/96), 681 So.2d 1271; *Gormley v. Grand Lodge of State of Louisiana*, 503 So.2d 181 (La.App. 4th Cir. 1987).

The presence of expressive or highly opinionated persons on a jury has been held not to constitute improper behavior. See, *Stockstill v. C.F. Industries, Inc.*, 94-2072 (La.App. 1st Cir. 12/15/95), 665 So.2d 802, *writ denied*, 96-0149 (La.3/15/96), 669 So.2d 428; *Theriot v. Theriot*, 622 So.2d 257 (La.App. 1st Cir. 1993), *writ denied*, 629 So.2d 1138 (La.1993); *Blandino v. Brown Erection Company, Inc.*, 341 So.2d 577 (La.App. 2nd Cir. 1977). Additionally, in *Carlin v. Blanchard*, 537 So.2d 303 (La.App. 1st Cir. 1988), statements by jurors expressing dissatisfaction with defendant sheriff's department as a result of prior unrelated occurrences was determined not to be so grievous as to necessitate a new trial where the jurors indicated that they were not influenced by the statements

in question and the jury was not polled. Discussions during deliberation of independent research conducted by a juror has also been held to be insufficient grounds for setting aside a jury verdict. See, *Wright v. Hirsch*, 560 So.2d 835 (La.1990); *Smith v. Bundrick*, 27552 (La.App. 2nd Cir. 11/3/95), 663 So.2d 554.

Facts substantially similar to those presented by the instant case were found in *Bossier v. DeSoto General Hospital*, 442 So.2d 485 (La.App. 2nd Cir. 1983), *writ denied*, 443 So.2d 1122 (La.1984). In *Bossier*, a juror failed to disclose during voir dire and thereafter that the law firm of plaintiffs' counsel was representing him in an ongoing pending lawsuit. Additionally, like the foreman in the case before us, the juror in *Bossier* was one of nine who voted in favor of the verdict.

Like Mrs. Brown in the instant case, the defendant in *Bossier* argued that the juror's false answer on voir dire precluded a challenge by defendant. In support of its motion for a new trial, the defendant in *Bossier*, cited cases from Florida and Mississippi involving the failure by a juror and counsel to disclose material facts relating to the representation of the juror by an attorney involved in the trial. While the cited cases uniformly held that a new trial was required irrespective of a showing that bias or prejudice caused an unjust verdict, the court in *Bossier* held that "[t]he mere presence of an individual on the jury who was being represented by plaintiffs' counsel in another entirely unrelated matter, in and of itself does not establish misconduct or partiality sufficient to preclude

the impartial administration of justice".[3] *Bossier*, 442 So.2d at 494.

In the case sub judice, the following colloquy took place between the juror in question and counsel for Mrs. Brown:

> Q: How about any lawsuits, anything of that sort? Have you – have you ever been involved in any lawsuits –
>
> A: Uh. –
>
> Q: – or have you ever sued anybody or been sued?
>
> A: No, sir.
>
> Q: Same with your wife?
>
> A: Not that I know of.
>
> Q: Okay, and I'll ask you, how about your dad? Did he –
>
> A: He had a cow had got out one time, and somebody had hit it, and they had a lawsuit against him.
>
> Q: Okay. All right. Would any of those – I mean, that lawsuit wouldn't change any – your ability –

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[3] In her brief in the instant case, Mrs. Brown relies on *Pierce v. Altman*, 147 Ga.App. 22, 248 S.E.2d 34 (1978), a Georgia appellate court decision which, absent a showing of bias or prejudice, reversed the trial court and granted plaintiffs a new trial based upon the jury foreman's untruthfulness during voir dire. Because Louisiana law requires the mover to prove that the conduct by the juror was of such a grievous nature as to preclude the impartial administration of justice, we decline to follow the holding of this case.

A: No.

Q: – to serve on this one, I hope. Okay. All right. Let's see, and – and how about you personally, have you ever been involved in a serious automobile accident?

A: No, sir.

In her motion for a new trial, Mrs. Brown alleges that a private investigator was retained following trial for the purpose of scheduling post-trial juror interviews. Upon contacting the juror in question, the investigator realized he had previously served this individual with process in an earlier, undisclosed lawsuit which had been filed in a different venue. Mrs. Brown accordingly attached a copy of the record of the undisclosed litigation to her motion. In connection with a subsequent memorandum filed by her in support thereof, Mrs. Brown also attached a copy of the deposition testimony elicited from the juror in the earlier action.

Upon review of this matter, it is undeniable that the juror in question failed to disclose on voir dire that he had been named as a defendant in a prior lawsuit filed four and a half years earlier. That litigation arose as a result of an incident wherein the juror, then 23 years of age, struck a youth on a bicycle one evening while returning from a day at the lake. There was evidence the juror had been drinking; however, there is no indication that he was ever charged with DWI. Nevertheless, the lawsuit included a claim for exemplary damages, which were not covered under his liability policy. The suit record reflects only that the suit was resolved some nine months later; and does not indicate whether the juror paid any portion of the settlement out of his personal funds.

While it seems inconceivable that the juror could have failed to recall this incident of four years previous, it is possible that the juror somehow concluded that counsel's question regarding prior lawsuits was directed towards suits which were ultimately tried, as opposed to those which were settled prior to trial. Another explanation could be that the juror was simply embarrassed by this incident and chose not to disclose it.

Our system of justice is centered around a search for the truth, and for this reason, we cannot condone this juror's failure to disclose facts asked of him during voir dire. Nevertheless, we cannot accept Mrs. Brown's argument that this juror was automatically biased and highly opinionated against her position at trial as a result of this earlier undisclosed and unrelated litigation. In our opinion, the fact that the juror failed to disclose he had been previously sued does not, by itself, constitute behavior of such a grievous nature so as to preclude the impartial administration of justice. For this reason, we cannot say that the trial court's refusal to grant a new trial constituted an abuse of discretion.

Operation Contrary To Owner's Manual

In her second assignment of error, Mrs. Brown asserts that the jury's finding of "no defect" is manifestly erroneous inasmuch as Mr. Lee Carr, a mechanical engineer retained by Ford, agreed that the restraint system found on Mrs. Brown's 1984 Lincoln Town Car operated contrary to the owner's manual. Mrs. Brown argues that such an admission amounts to a concession by Ford that the restraint system in her Town Car was defective. While

Ford acknowledges that the description of the restraint system found in the owner's manual of the 1984 Town Car was incorrect, it does not concede that the system itself was defective.

The record reflects that the occupant restraint system found in 1983 and earlier Town Car models utilized a dual retractor seat belt system. This meant that the shoulder harness portion of the restraint system operated differently from the lap belt portion. The retractor on the shoulder harness was equipped with a "comfort" or "window shade" tension eliminator feature which allowed the occupant to alleviate belt pressure on the chest by introducing a degree of slack into the system. Ford claimed that this feature increased seat belt usage by eliminating a major complaint expressed by a number of drivers: that seat belt systems cut uncomfortably across their neck or shoulder. Pre-1984 models also had a retractor on the lap belt which was not equipped with a tension eliminator; therefore, the lap belt would adjust automatically to a snug position around the occupant's waist.

In its 1984 through 1989 Town Car models, Ford switched to a single retractor, continuous loop seat belt system, which meant that both the shoulder harness and the lap belt were controlled by a single retractor equipped with the "window shade" tension eliminator. This meant that an occupant could now introduce slack into the lap belt as well as the shoulder harness. The seat belt provisions of the owner's manual which accompanied the 1984 and 1985 models remained unchanged from the 1983 edition and did not reflect this change in the operation of the seat belt system until 1986.

The Louisiana Products Liability Act (hereafter, LPLA) provides exclusive grounds for recovery against the manufacturer of an allegedly defective product. La. R.S. 9:2800.52. Under the provisions of the LPLA, a claimant seeking to recover must prove that his damages were proximately caused by a characteristic of the product that renders the product unreasonably dangerous in its reasonably anticipated use by the claimant or another person or entity. La. R.S. 9:2800.54(A). A product may be unreasonably dangerous due to: (1) its construction and composition; (2) its design; (3) the manufacturer's failure to provide an adequate warning; and/or (4) its failure to live up to an express warranty made by its manufacturer. La. R.S. 9:2800.54(B).

On appeal, Mrs. Brown asserts that the restraint system in her 1984 Lincoln Town Car was defective based upon Ford's failure to warn her that the lap belt would not adjust automatically in the manner described in the owner's manual. In support of this assertion, Mrs. Brown cites *Bloxom v. Bloxom*, 512 So.2d 839 (La.1987), and *Dunne v. Wal-Mart Stores, Inc.*, 95-2047 (La.App. 1st Cir. 9/10/96), 679 So.2d 1034, for the proposition that a manufacturer can be held liable where instructions in an owner's manual are complete and correct, but not readily apparent, or simply incomplete. Accordingly, Mrs. Brown argues that liability should attach in this case where the provisions in the owner's manual are blatantly incorrect.

Upon review of this matter, we decline to hold that the jury erred in finding that the restraint system in Mrs. Brown's 1984 Lincoln Town Car was unreasonably dangerous or defective based upon inadequate warning. While it is undisputed that the seat belt system in the

1984 model operated differently from the manner described in the owner's manual, it is clear from the testimony of Mrs. Brown's own witnesses that she was a habitual seat belt user who routinely "popped" her seat belt to remove unwanted slack. La. R.S. 9:2800.57B(2) provides that a manufacturer is not required to provide a warning when the user knows of a characteristic of the product that may cause damage.

Mrs. Brown further argues that the restraint system was also unreasonably dangerous in design pursuant to R.S. 9:2800.56. Alleging that alternate seat belt designs were available, Mrs. Brown claims that if adopted for use on her 1984 Town Car, said alternate design would have been capable of preventing her injuries. La. R.S. 9:2800.56 provides:

> A product is unreasonably dangerous in design if, at the time the product left its manufacturer's control:
>
> (1) There existed an alternative design for the product that was capable of preventing the claimant's damage; and
>
> (2) The likelihood that the product's design would cause the claimant's damage and the gravity of that damage outweighed the burden on the manufacturer of adopting such alternative design and the adverse effect, if any, of such alternate design on the utility of the product. An adequate warning about a product shall be considered in evaluating the likelihood of damage when the manufacturer has used reasonable care to provide the adequate warning to users and handlers of the product.

It is sufficient for our purposes to say that alternating theories of causation were advanced by Mrs. Brown and Ford. Mrs. Brown argued that slack in the seat belt caused her to strike the right side of her face on the vehicle's driver's side A-pillar and adjacent windshield area. Conversely, Ford argues that Mrs. Brown's injuries were sustained when a piece of metal trim from the party barge came loose, broke the windshield and passed through the occupant compartment of the vehicle. Ford further argues that the corner of the party barge intruded into the occupant compartment as it swept alongside Mrs. Brown's vehicle.

Though the jury never found that there was excess slack in the seat belt, we conclude that based on the record, it would have been reasonable to find that there was no excess slack in the seat belt. Thus, we cannot conclude the seat belt was unreasonably dangerous in design.

This assignment of error is without merit.

Consideration by Jury of Defect Issue

Mrs. Brown asserts, in her third assignment of error, the trial court erred in allowing the jury to consider the question of whether or not the restraint system was defective. In brief, Mrs. Brown concedes that at trial, all parties reasonably believed that the existence of a defect was a question of fact within the jury's province; however, in light of several recent decisions from this court, Mrs. Brown now argues that the question of defect is legal in nature, and therefore, is subject to *de novo* review by this court. Specifically, Mrs. Brown relies upon our

previous decisions in *Dixon v. Schwegmann Giant Supermarkets*, 95-2048 (La.App. 1st Cir. 5/10/96), 673 So.2d 696; *Green v. City of Thibodaux*, 94-1000 (La.App. 1 Cir. 10/6/95), 671 So.2d 399, *writ denied*, 95-2706 (La.2/28/96), 668 So.2d 366 and; *Phipps v. Amtrak*, 94-1876 (La.App. 1st Cir. 11/20/95), 666 So.2d 341, *writ denied*, 95-3012 (La.2/28/96), 668 So.2d 368. In each of those cases, this court reversed the trial court's determination that the defect or condition complained of constituted an unreasonable risk of harm[4].

In the instant case, the initial question on the jury verdict form was "Did the restraint system in Mrs. Brown's Town Car have a defect?" The jury responded in the negative. Because the jury made a factual finding that the restraint system was not defective, there was no need for a further legal determination as to whether the defect was such that it presented an unreasonable risk of harm.

This assignment of error is without merit.

Directed Verdict as to Breach of Express Warranty

In her fourth assignment of error, Mrs. Brown asserts that the trial court committed legal error when it directed a verdict against her claim that Ford breached an express warranty. Specifically, Mrs. Brown argues that because the restraint system in Mrs. Brown's 1984 Lincoln Town

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[4] The issues presented by the cited cases were whether: water on the floor in supermarket check-out aisle (*Dixon*), a broken municipal sidewalk (*Green*), and a recessed aisle in a railroad observation car (*Phipps*) presented unreasonable risks of harm.

Car did not operate in the manner provided in the owner's manual, this deviation constituted a breach by Ford of an express warranty.

On appeal, the standard of review for directed verdicts is whether, viewing the evidence submitted, the appellate court concludes that reasonable people could not reach a contrary verdict. *Busby v. St. Paul Insurance Company*, 95-2128 (La.App. 1st Cir. 5/10/96), 673 So.2d 320, *writ denied*, 96-1519 (La.9/20/96), 679 So.2d 443. Pursuant to R.S. 9:2800.53 of the Louisiana Products Liability Act, R.S. 9:2800.51 *et seq.* (hereinafter, LPLA), an "express warranty" is defined as:

> a representation, statement of alleged fact or promise about a product or its nature, material or workmanship that represents, affirms or promises that the product or its nature, material or workmanship possesses specified characteristics or qualities or will meet a specified level of performance. "Express warranty" does not mean a general opinion about or general praise of a product. A sample or model of a product is an express warranty.
>
> La. R.S. 9:2800.53(6).

A subsequent provision of the LPLA provides:

> A product is unreasonably dangerous when it does not conform to an express warranty made at any time by the manufacturer about the product if the express warranty has induced the claimant or another person or entity to use the product and the claimant's damage was proximately caused because the express warranty was untrue. La. R.S. 9:2800.58.

Mrs. Brown points to the erroneous seat belt provision contained in the owner's manual of her 1984 Lincoln Town Car and contends that because the seat belt in the 1984 model does not operate as stated in the owner's manual, that said provision constitutes a breach by Ford of an express warranty.

As we have previously noted, it is undisputed that the seat belt system in the 1984 model operated differently from the manner described in the owner's manual. Based upon our review of the record, we can find no evidence that Mrs. Brown read the owner's manual or, more importantly, that provisions in question induced her to use the restraint system. See, *Clay v. International Harvester Company*, 95-1572 (La.App. 3rd Cir. 5/8/96), 674 So.2d 398. The record further reflects only that Mrs. Brown was a habitual seat belt user who was familiar with the way in which the restraint system operated. Based upon these findings, we are unable to say that reasonable people could not have reached a contrary verdict; therefore this assignment of error is without merit.

Directed Verdict as to Redhibition [sic]

The fifth and final assignment of error raised by Mrs. Brown is that the trial court committed legal error when it directed a verdict against her claim of redhibitory defect.

Pursuant to Acts 1993, No. 841, § 1, the civil code articles on redhibition were revised effective January 1, 1995. The record reflects that Mrs. Brown purchased her 1984 Lincoln Town Car on November 7, 1983. Thus the

law in effect at the time of the sale is controlling. *Palomo v. LeBlanc Hyundai Partnership*, 95-278 (La.App. 5th Cir. 10/31/95), 665 So.2d 414, *writ denied*, 96-0399 (La.3/22/96), 669 So.2d 1214. At the time of the sale of the vehicle to Mrs. Brown, La. Civ.Code art. 2520 provided:

> *Redhibition* is the avoidance of a sale on account of some vice or defect in the thing sold, which renders it either absolutely useless, or its use so inconvenient and imperfect, that it must be supposed that the buyer would not have purchased it, had he known of the vice.

In directing a verdict in favor of Ford as to Mrs. Brown's redhibition claim, the trial judge noted, "I have not seen anything that looked like redhibition going on on this witness stand up here, I really haven't." We agree.

After a thorough review of the record in this matter, it is clear that while Mrs. Brown was an adamant seat belt wearer, she drove her vehicle for seven and a half years prior to this accident in July of 1991. There was no evidence that she was ever dissatisfied with the manner in which the seat belts operated, or that she ever tendered her vehicle to the dealer with a complaint about slack in the seat belt. Clearly, reasonable people could not conclude that the restraint system rendered Mrs. Brown's Town Car absolutely useless or its use so inconvenient and imperfect that she would not have purchased it. We must conclude that this assignment of error lacks merit.

CONCLUSION

For the reasons set forth above, the judgment of the trial court is hereby affirmed. All costs associated with this appeal are assessed against the plaintiff, Mescal Blanchard Brown.

AFFIRMED.

SHORTESS, J., concurs in the result.

FOGG, J., concurs in part, and dissents in part with reason.

FOGG, Judge, concurring in part, dissenting in part.

Although I believe the result reached by the majority in this case is correct, I cannot agree with the position taken by the majority on the issue of juror misconduct; therefore, I respectfully concur in the result reached, and dissent in part for the reasons stated herein.

Following the close of the trial in the instant case, an investigator retained by plaintiff discovered that one of the jurors had answered falsely during voir dire when questioned as to whether he had ever been sued. It was revealed that the juror had in fact been named a defendant approximately four years earlier in a suit arising from a motor vehicle accident, during which the juror in question was allegedly driving while intoxicated and collided with a bicyclist. The lawsuit apparently concluded with a settlement within nine months of its filing. There is no doubt the juror was aware of the existence of the lawsuit since he was served notice of the litigation. However, when asked during the trial voir dire, "[H]ave you ever sued anybody or been sued," the juror responded, "No, Sir."

Plaintiff appeals the refusal of the trial court to grant a new trial on this basis. In upholding the trial court, the majority of this court opinion concludes: "the fact that the juror failed to disclose he had been previously sued does not, by itself, constitute behavior of such a grievous nature so as to preclude the impartial administration of justice." I do not agree.

As noted by the majority, our system of justice is centered around a search for the truth; therefore, how can we say that the perpetration of a falsehood on the court by a juror entrusted to render a verdict based on his finding of fact as to the truth of the matter at issue, does not constitute behavior so grievous as to preclude the impartial administration of justice? A juror who evidences a disregard for truth cannot be entrusted with the job of ascertaining truth.[1]

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[1] The only case cited to this court which addresses similar factual circumstances is that of *Bossier v. DeSoto General Hospital*, 442 So.2d 485 (La.App. 2 Cir. 1983), *writ denied*, 443 So.2d 1122 (La.1984). In that case, a juror disclosed during voir dire an attorney/client relationship with plaintiff's attorney, the nature of which was not explored by defendant's attorney. During later voir dire questioning, defendant's attorney asked all members of the panel, "Have you ever been a party to a lawsuit before, either as a Plaintiff or as a Defendant;" to which the juror in question responded, "No, . . . " It was later revealed that plaintiff's attorney was representing this juror in another ongoing matter. The *Bossier* court found that the juror had answered "incorrectly," but had *not* "intentionally misled defendant's counsel or the court concerning the relationship between the juror and plaintiffs' counsel;" no misconduct effecting the jury verdict was found in that instance. The court apparently found the juror believed the subsequent questioning was not addressed to the matter previously disclosed. Therefore, we do not find *Bossier* authoritative in this case.

For this reason, I disagree with the majority conclusion on this issue and would find the jury verdict tainted by this juror's misconduct. Under these circumstances, it would be necessary for an appellate court to undertake an independent evaluation of the facts and adjudicate the controversy. Nevertheless, after reviewing the case, I believe the plaintiff failed to prove the existence of the defect as alleged. Consequently, I concur in the result of the majority opinion, finding no liability on the part of the defendant.

APPENDIX C

The Supreme Court of the State of Louisiana

MESCAL BLANCHARD BROWN,
THOMAS A. BROWN and
GLORIA BROWN SEELY

NO. 97-C-2623

VS.

TAMELA D. HUDSON,
RUDOLPH HUDSON
SHELTER MUTUAL
INSURANCE COMPANY
STATE FARM INSURANCE
COMPANY ET AL

IN RE: Brown, Mescal Blanchard; – Plaintiff(s); Applying for Writ of Certiorari and/or Review; Parish of Pointe Coupee 18th Judicial District Court Div. "D" Number 26,505. 26,504; to the Court of Appeal, First Circuit, Number CA96 2087

January 9, 1998

Denied.

JTK

PFC

WFH

CDK

BJJ

JPV

CDT

LEMMON, J. not on panel.

Supreme Court of Louisiana
January 9, 1998

/s/ John T. Olivier
Clerk of Court
For the Court

APPENDIX D

AFFIDAVIT

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

BE IT KNOWN, that on this day before me, ALAN L. SCHWARTZBERG, Notary Public, in and for said parish, duly commissioned and sworn, personally came and appeared ROGER PHILLIPS, competent major resident of the Parish of East Baton Rouge who, after being duly sworn did say:

1. I am a legal investigator and have been employed as one for 14 years.

2. I was contacted by Kleinpeter, Schwartzberg & Stevens to assist in post trial juror interviews in the matter of *Janie Lind Pogue, et al versus Tamela Hudson consolidated with Mescal Brown, et al versus Tamela Hudson,* Suite Number 26,504, Parish of Pointe Coupee, State of Louisiana. (Hereinafter *Brown v. Ford*).

3. I personally contacted several jurors who served in the *Brown v. Ford* case who agreed to a meeting in West Baton Rouge Parish at the McDonald's on Highway 190 in Erwinville, Louisiana on January 5, 1996.

4. My personal discussions with jurors Mrs. Lydia Vancel, Mr. Daniel Cline and Mr. James Cormier revealed that the forepersonship of the jury was seized by juror Mr. Mark Allement in the following manner:

> It was originally suggested that Mrs. Vancel serve as foreperson but she declined, having previously served on another jury; it was then offered to juror Mr. Alton Castille who considered the position, but during his deliberation

juror Mr. Mark Allement seized the jury verdict form and proclaimed himself foreperson.

5. My personal discussions with jurors Mrs. Vancel, Mr. Cline and Mr. Cormier revealed that foreperson Mr. Mark Allement would not allow any other juror to view the Verdict Form at any time during juror deliberations insisting that he maintain control of the Verdict Form at all times.

6. My personal discussions with juror Mrs. Lydia Vancel and juror Mr. Daniel Cline revealed that juror Mr. James Cormier, a Livonia Police Officer, stated repeatedly in juror deliberations that in the many accidents he investigated while performing his official duties as a Livonia Police Officer, he had never known a seat belt to contribute to injuries in an accident.

FURTHER APPEARER SAITH NOT.

/s/ Roger Phillips
ROGER PHILLIPS

SWORN AND SUBSCRIBED TO before me, Notary Public, on this 28th day of February, 1996 at Baton Rouge, Louisiana.

/s/ Illegible
NOTARY PUBLIC
My Commission is for life.

APPENDIX E

EIGHTEENTH JUDICIAL DISTRICT COURT
PARISH OF WEST BATON ROUGE
STATE OF LOUISIANA

CATHY JOHNSON, individually and on behalf of her minor children, JEROME MICHAEL GEORGE, JR. and EBONY GEORGE

SUIT NO.: 22781

DIVISION: _____

VERSUS

MARK T. ALLEMENT and BONNEVILLE AUTOMOBILE INSURANCE COMPANY

PETITION FOR DAMAGES

The petition of **Cathy Johnson**, a competent major resident of the Parish of West Baton Rouge, State of Louisiana, individually, and on behalf of her minor children, **Jerome George** and **Ebony George**, respectfully represents:

1.

Made defendants herein are:

A.) **Mark T. Allement**, a competent major resident of the Parish of Point Coupee, State of Louisiana; and

B.) **Bonneville Automobile Insurance Company**, a foreign insurance company licensed to do and doing business in the State of Louisiana with the Secretary of State for the State of Louisiana as its appointed agent for service of process.

C.) **Allstate Insurance Company,** a foreign insurance company licensed to do and doing business in the State of Louisiana, with the Secretary of State for the State of Louisiana as its agent for service of process.

Count I.

Petitioner individually and on behalf of her minor son, **Jerome Michael George, Jr.,** avers that:

1.

On or about December 2, 1989, defendant, **Mark T. Allement**, was operating a 1988 Chevrolet 6000 pickup truck northbound on La. 987-3 in West Baton Rouge Parish. As defendant, **Mark T. Allement,** was proceeding northerly on La. 987-3, he violently struck petitioner's minor son, **Jerome George,** who was riding his bicycle on the southbound shoulder of La. 987-3.

2.

At the time of the accident, defendant, **Bonneville Automobile Insurance Company** issued a policy of automobile liability insurance to defendant, **Mark T. Allement,** for coverage on a 1988 Chevrolet 6000 pickup truck, which was in full force and effect at the time of the above stated accident.

3.

Petitioner, **Cathy Johnson** on behalf of her minor son, Jerome George, alleges that defendants, **Mark T.**

Allement and **Bonneville Automobile Insurance Company,** are liable, in solido, to petitioners for any and all damages as are reasonable in the premises as a result of the accident due to the negligence of defendant, **Mark T. Allement**, in the following non-exclusive particulars, to wit; (a) failure to maintain control of his vehicle, (b) failure to yield to pedestrians, (c) the wanton and reckless manner he operated his vehicle in a [sic] an intoxicated state with complete disregard for the safety of others, and (d) failure to maintain a proper lookout, together with any other acts of negligence to be proven at the trial of this matter.

4.

Petitioner shows that at the time of the accident, defendant **Mark T. Allement**, was **intoxicated**, and thus by virtue of L.S.A.-Civil Code art. 2315.4, petitioner, **Cathy Johnson**, seeks exemplary damages in addition to any general and special damages which may be awarded for the injuries sustained to her minor son, **Jerome George.**

5.

Petitioner's minor child, **Jerome George**, has been confined to a hospital bed since the accident, endured physical pain and suffering, emotional distress, disability, undergone medical treatment, and incurred medical expenses as a result of the personal injuries he received due to the negligence of defendant, **Mark T. Allement. Jerome George** will suffer future medical expenses and permanent disability as a direct result of the accident.

6.

Petitioner further states that at the time of the accident there was an insurance policy of uninsured/underinsured motorist coverage in full force and effect, issued to petitioner, from defendant, **Allstate Insurance Company**. The policy of insurance issued to petitioner, **Cathy Johnson** afforded coverage for petitioner and her resident relatives in such instances as those which the [sic] her minor son received in the above stated accident.

Count II.

Petitioner individually and on behalf her minor daughter **Ebony George**, avers that:

1.

Petitioner's daughter child, **Ebony George**, ten (10) years of age, arrived at the scene of the accident immediately after the accident. Whereupon seeing her brother lying in a ditch in a state of unconsciousness, with severe injuries, Ebony George had a seizure.

2.

Prior to the accident, petitioner's minor daughter, **Ebony George never** had a seizure. Since the date of the accident, petitioner's minor daughter, Ebony George has had headaches, and reoccurring nightmares, with the possibility of future seizures from viewing her brother immediately after the accident.

3.

Petitioner has incurred medical expenses and will continue to incur medical expenses as a direct result of the serious emotional and mental anguish petitioner's minor daughter, **Ebony George**.

4.

Petitioner, on behalf of her minor daughter, **Ebony George** makes a claim against defendants, **Mark T. Allement, Bonneville Automobile Insurance Company**, and **Allstate Insurance Company** for the severe emotional and mental anguish that Ebony George received as a direct result of the above stated accident.

Count III.

1.

Petitioner **Cathy Johnson**, individually has lost wages, and the love and affection due to the injuries of both her minor children, Jerome George and Ebony George, and hereby makes a claim for these damages, due to the negligence of the defendants, **Mark T. Allement**, and **Bonneville Automobile Insurance Company**.

Count IV.

1.

Petitioner further states that at the time of the accident there was an insurance policy of uninsured/underinsured motorist coverage in full force and effect, issued

to petitioner, from defendant, **Allstate Insurance Company**. The policy of insurance issued to petitioner, **Cathy Johnson** afforded coverage for petitioner and her resident relatives in such instances as those which the [sic] her minor son received in the above stated accident.

2.

Petitioner, **Cathy Johnson**, believes that her injuries and the injuries of both her minor children, **Jerome George** and **Ebony George** will exhaust insurance of the defendant, **Mark T. Allement,** and **Bonneville Automobile Insurance Company** and hereby make formal notice of this claim against defendant, **Allstate Insurance Company,** for uninsured/underinsured motorist coverage under petitioner's contract of insurance.

WHEREFORE, petitioner, Cathy Johnson individually and, on behalf of her minor children, **Jerome George** and **Ebony George** prays for judgment in favor of petitioner and against defendants, **Mark T. Allement** and **Bonneville Automobile Insurance Company,** in solido, and defendant, **Allstate Insurance Company,** and after all due proceedings be had, for any and all damages as are reasonable in the premises as a result of the accident, and for exemplary damages as this Honorable Court deems reasonable, together with costs and interest from

the date of judicial demand and for any other equitable relief as this Honorable Court may deem appropriate.

Respectfully submitted,

Attorney for Plaintiff

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Telephone No.: (504) 766-6898
Bar Code No. 8039

Please Serve:
Mark T. Allement
Rt. 1 Box 301
Glynn, Louisiana;

Bonneville Automobile Insurance Company
through its authorized agent for service of process
Hon. Walter "Fox" McKeithen
Secretary of State, State of Louisiana
Baton Rouge, Louisiana;

and **Allstate Insurance Company**
through its authorized agent for service of process
Hon. Walter "Fox" McKeithen
Secretary of State, State of Louisiana
Baton Rouge, Louisiana.

CATHY JOHNSON, INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILDREN, JEROME MICHAEL GEORGE, JR. AND EBONY GEORGE	NUMBER: 22,781 DIVISION: C
VERSUS	18TH JUDICIAL DISTRICT COURT PARISH OF WEST BATON ROUGE
MARK T. ALLEMENT, ET AL.	STATE OF LOUISIANA

ANSWER

NOW INTO COURT, through undersigned counsel, comes Mark T. Allement (Allement) and Bonneville Insurance Company (Bonneville), who, in response to the petition of Cathy Johnson, individually, respectfully represents:

1.

Allement admits that he is a competent major resident of the Parish of Pointe Coupee, State of Louisiana. Bonneville admits being a foreign insurer authorized to do and doing business in the State of Louisiana. Defendants are without knowledge or information sufficient to justify a belief as to the truth of the remaining allegations of fact contained in Paragraph 1.

2.

In response to Paragraph 1 of Count 1, defendants admit that Allement was operating a 1988 Chevrolet 6000 pick-up northbound on Louisiana Highway 987-3 in West Baton Rouge Parish. Defendants further admit that the

car he was driving struck a bicycle which was occupied by an individual. Defendants deny the remaining allegations of fact contained in Paragraph 1.

3.

The allegations of fact contained in Paragraph 2 are admitted. However, the policy contains many terms and conditions, all of which are incorporated into this answer by reference thereto.

4.

The allegations of fact contained in Paragraph 3 are denied.

5.

The allegations of fact contained in Paragraph 4 are denied. Furthermore, should the trier of fact conclude that Allement was intoxicated and, furthermore, that punitive damages are appropriate. Bonneville asserts that its policy of insurance excludes coverage for punitive or exemplary damages.

6.

Defendants are without knowledge or information sufficient to justify a belief as to the truth of the allegations of fact contained in Paragraphs 5 and 6 of Count 1.

7.

In response to Count 2, defendants are without knowledge or information sufficient to justify a belief as to the truth of the allegations contained in Paragraphs 1, 2 and 3 of count 2.

8.

Paragraph 4 of Count 2 does not call upon the defendants to admit or deny, inasmuch as Paragraph 4 does not contain factual allegations. However, if Paragraph 4 does contain factual allegations, the same are denied.

9.

In response to Count 3, Paragraph 1, defendants deny the negligence of Allement and Bonneville. Defendants are without knowledge or information sufficient to justify a belief as to the truth of the remaining allegations of Paragraph 1 of Count 3.

10.

Defendants are without knowledge of information sufficient to justify a belief as to the truth of the allegations of fact contained in Paragraph 1 of Count 4.

11.

In response to Paragraph 2 of Count 4, defendants deny being indebted to petitioner.

WHEREFORE, defendants pray that the petition filed in this matter be dismissed.

By Attorneys:

HUNTER & SAMAHA

By: /s/ John N. Samaha
JOHN N. SAMAHA
P.O. Box 2786
Baton Rouge, LA 70821
(504) 336-4052
Bar Roll #11676

CERTIFICATE

I CERTIFY that a copy of the foregoing Answer has been served upon the plaintiff by mailing a copy thereof, postage prepaid, addressed to her attorney of record, Andre P. LaPlace, 8414 Bluebonnet Road, Suite 110, Baton Rouge, LA 70810.

Baton Rouge, Louisiana, this 26th day of September, 1990.

/s/ John N. Samaha
JOHN N. SAMAHA

CATHY JOHNSON, ET UX	:	NUMBER 22,781,
VERSUS	:	DIVISION "C"
MARK T. ALLEMENT, ET AL	:	18TH JUDICIAL DISTRICT COURT
	:	PARISH OF WEST BATON ROUGE
	:	STATE OF LOUISIANA

ANSWER AND CROSS-CLAIM

NOW INTO COURT, through undersigned counsel, comes defendant herein, ALL STATE INSURANCE COMPANY, who for response to the allegations contained in plaintiff's petition, respectfully denies each and every allegation contained therein, except those that may be specifically admitted hereinafter, if any, and further answering states:

1.

Upon information and belief, the allegations contained in paragraphs 1 and 2 of plaintiff's petition are admitted to be substantially correct.

2.

The allegations contained in paragraphs 3 and 4 of plaintiff's petition are denied as written.

3.

For lack of sufficient information upon which to justify a belief therein, the allegations contained in paragraphs 1 (Count I), 5, and 1-4 (Count II) of plaintiff's petition are denied. Furthermore, the peremptory exception of no cause of action is asserted with respect to those allegations.

4.

Answering the allegations contained in paragraphs 6 and 1-2 of Count IV of plaintiff's petition, although appearer admits it issued a policy of automobile liability insurance, in that said policy is a written contract and itself the best nevidence [sic] of its own contents, any allegation which would otherwise broaden and/or extend the terms of the aforementioned coverage are specifically denied (and further answering all terms/provisions of the policy are adopted herein by reference as if copied in extenso, including the $10,000.00 per person liability limit).

5.

In response to all allegations set forth in Count III, the peremptory exception of no cause of action is asserted as a defense and all said allegations are denied.

6.

Alternatively, and only in the event any responsibility is found to exist on the part of defendant herein, the propriety of which is emphatically denied, upon any

showing of inattention/negligence/legal fault on the part of JERQME MICHAEL GEORGE, JR., the recovery of plaintiff should be reduced in accord with the percentage or degree of inattention/negligence/legal fault on his part.

AND NOW ASSUMING THE POSITION OF CROSS-CLAIMANT, original defendant herein, ALLSTATE INSURANCE COMPANY, a foreign insurer authorized to do and doing business in the Parish of East Baton Rouge, State of Louisiana, respectfully states:

1.

Named as cross-defendant herein is original defendant, MARK T. ALLEMENT, a resident of the full age of majority of the parish of East Baton Rouge, State of Louisiana.

2.

It is shown Allstate has been named a defendant pursuant to a policy of insurance which allegedly provided uninsured or underinsured motorist coverage in favor of plaintiffs at the time of the accident. Accordingly, in the event there is a finding of responsibility/liability on the part of Allstate, it must be founded upon corresponding findings that cross-defendant herein was both at fault and uninsured or underinsured at the time of the accident. Thus, a corresponding judgment should be rendered in favor of Allstate against cross-defendant in the same amount to which Allstate is cast on the main demand.

3.

Finally answering, it is shown appearer is entitled to and indeed desires to have all issues in this proceeding tried before a civil jury.

WHEREFORE, defendant herein, ALLSTATE INSURANCE COMPANY, respectfully prays:

I. That this answer be deemed good and sufficient and, after all due proceedings, judgment be rendered herein in favor of defendant, dismissing plaintiff's suit, with prejudice, at her costs, or alternatively that any recovery allowed plaintiff be reduced in accord with the percentage or degree of inattention/negligence/legal fault on the part of JEROME MICHAEL GEORGE, JR.;

II. That a corresponding judgment be rendered on the cross-claim in favor of Allstate and against Mark T. Allement in the same amount to which Allstate is cast on the main demand;

III. That all issues in this proceeding be tried before a civil jury.

BY ATTORNEYS:

MATHEWS, ATKINSON,
GUGLIELMO, MARKS & DAY
P.O. BOX 3177
BATON ROUGE, LA 70821
TELEPHONE (504) 387-6966

BY: /s/ JOHN W. PERRY, JR.

SERVICE INFORMATION:

Please withheld service on the cross-claim pending further notification (as it is anticipated counsel for Mark T.

Allement will appear voluntarily and answer the incidental demand on his behalf).

ORDER

Considering the foregoing:

IT IS ORDERED that all issues in this proceeding be tried before a civil jury upon defendant furnishing a bond to cover additional costs, the amount of the bond and deadline for filing same to be fixed at a pretrial conference of this case.

Port Allen, Louisiana, this 16 day of Oct., 1990.

/s/ Jack Marionneaux
JUDGE, 18TH JUDICIAL
DISTRICT COURT

CERTIFICATE

I hereby certify that a copy of the above and foregoing has this day been mailed, postage prepaid, to Andre P. LaPlace, 8414 Bluebonnet Blvd., Suite 110, Baton Rouge, Louisiana, 70810.

Baton Rouge, Louisiana, this 28th day of September, 1990.

/s/ _____
JOHN W. PERRY, JR.

STATE OF LOUISIANA	)	**60-2-90**
Parish of West Baton Rouge	)	**18th Judicial District Court**
	)	

To MARK T. ALLEMENT RT 1 BOX 301 GLYNN LA

_____ Residing in said Parish and State

YOU ARE HEREBY SUMMONED to comply with the prayer of the annexed petition, or file your answer thereto in writing, in the office of the Clerk of the 18th Judicial District Court of the State of Louisiana, in and for the Parish of West Baton Rouge, situated at the Court House of said Parish within fifteen (15) days after the service hereof, under penalty of default.

No. 22,781

CATHY JOHNSON, IND. ET AL)
)
Vs.)
)
MARK T. ALLEMENT, ET AL)

Witness, the Honorable Judges of said Court this 24th day of August, 1990

/s/ Charlotto Zeto
Deputy Clerk

PERSONAL SERVICE

On the ___ day of _____ 19__ I served the original of the within citation and a certified copy of the accompanying petition on _____ the defendant, by tendering same to him in person in the Parish of _____

_____
Deputy Sheriff,
Parish of _____

DOMICILIARY SERVICE

On the ___ day of _____ 19__ I served the original of the within citation and a certified copy of the accompanying petition on _____ the defendant, at his dwelling house or usual place of abode at _____ by leaving same with _____ a person of suitable age and discretion residing therein as a member of defendant's domiciliary establishment.

_____
Deputy Sheriff,
Parish of _____

THOMAS J. LEBLANC
CLERK OF COURT, EIGHTEENTH DISTRICT
PARISH OF WEST BATON ROUGE,
PORT ALLEN, LA. 70767

Aug. 23, 1990

HON. PRESTON CHUSTZ,)
SHERIFF)
POINTE COUPEE PARISH)
P. O. BOX 248)
NEW ROADS, LA. 70760)

Phone 383-0378

Re: NO. 22781

Cathy Johnson et al

vs.

Mark T. Allement et al

Dear Sir:

Enclosed is/are Citation & Petition

in the above numbered and entitled matter to be served on:

/s/ Mark L. Allement

Please make service of the copy/copies of the Citation showing service data on the original and return to me, together with your charges.

Sincerely Yours,

THOMAS J. LEBLANC
CLERK OF COURT

/s/ Charlotto Zeto
(Deputy Clerk)

JUDGMENT OF DISMISSAL

In the above entitled and numbered cause now comes the plaintiff, and with respect moves that said suit be dismissed, with prejudice, as against ALLSTATE INSURANCE COMPANY only, fully reserving unto plaintiffs all rights against all remaining defendants, at the costs of plaintiff.

BY ATTORNEY:

/s/ Andre P. LaPlace
ANDRE P. LaPLACE
8414 BLUEBONNET,
SUITE 110
BATON ROUGE, LA 70810

JUDGMENT

On motion of counsel for plaintiff in above entitled and numbered cause:

IT IS ORDERED, ADJUDGED AND DECREED that said suit be dismissed, with prejudice, as against ALLSTATE INSURANCE COMPANY only, fully reserving unto plaintiffs all rights against all remaining defendants, at the costs of plaintiff. Thus done and signed in CHAMBERS on this 4 day of April, 1991.

/s/ Edward Engolio
JUDGE, 18TH JUDICIAL
DISTRICT COURT

This is to certify that the costs of Court, including this Judgment of Dismissal, amounting to $___ ($___ due the Sheriff of West Baton Rouge, and $___ due the Clerk of Court) are paid in full.

Signed this ___ day of _____, 1991.

DEPUTY SHERIFF

DEPUTY CLERK OF COURT

CERTIFIED COPIES TO:

John W. Perry, Jr.
P.O. Box 3177
Baton Rouge, LA 70821

CIVIL SUBPOENA

State of Louisiana – Parish of West Baton Rouge

TO MR. FRANK GENTILE, 3327 PINE ROAD, PORT ALLEN, LA.

You are hereby commanded to appear in the Eighteenth Judicial District Court, holden in and for the Parish of West Baton Rouge, on the 14th day of May, 1991 at 9:30 o'clock a. m., and there to remain until discharged by the Court by whom you are summoned to testify to the truth, to the best of your knowledge, in a certain case pending therein between CATHY JOHNSON, ET AL Plaintiff,

and MARK T. ALLEMENT, ET AL
Defendant, on the part of the PLAINTIFF. (Ordered by MR. ANDRE P. LAPLACE)
Attorney

And, therefore, you are not to fail under penalty of the law.

No. 22,781 Division "C"

CATHY JOHNSON, ET AL

Vs.

MARK T. ALLEMENT, ET AL

By order of said Court, this 25th day of April, 1991

THOMAS J. LeBLANC, CLERK OF COURT

/s/ Charlotto Zeto
Deputy Clerk

Tuesday, May 14, 1991

Court was regularly opened by the Sheriff, present the Honorable Edward M. Engolio, Judge.

Cathy Johnson, Ind. and on behalf of her minor children, Jerome and Ebony George Vs. No. 22,781 Mark T. Allement and Bonneville Automobile Ins. Co.	On representation of counsel that the matter has been settled, the matter was passed.
Parish of West Baton Rouge Vs. No. 23,305 Frances M. Fontana, et al	On motion of Neal Harmon, counsel for plaintiff, the matter is reassigned to June 18, 1991, as the second setting.

/s/ Charlotto Zeto

APPENDIX F

JANIE LIND POGUE, ET AL	NUMBER 26,504, DIVISION D
VERSUS	18TH JUDICIAL DISTRICT COURT
TAMELA D. HUDSON, ET AL	PARISH OF POINTE COUPEE STATE OF LOUISIANA

CONSOLIDATED WITH

MESCAL B. BROWN, ET AL	NUMBER 26,505, DIVISION D
VERSUS	18TH JUDICIAL DISTRICT COURT
TAMELA D. HUDSON, ET AL	PARISH OF POINTE COUPEE STATE OF LOUISIANA

Transcript of the Jury Voir Dire had in this matter on the 20th day of March, 1995, in Open Court, before the Honorable Jack T. Marionneaux, Judge Presiding, at the Pointe Coupee Parish Courthouse. New Roads, Louisiana.

APPEARANCES:

KATHRYN WYBLE	*	
Jackson and Wyble	*	
Post Office Box 82710	*	For the Janie L. Pogue, et al
Baton Rouge, LA	*	
70884-2710	*	
	*	

ROBERT E. KLEINPETER *
JAY MCMAINS *
Kleinpeter, Schwartzberg *
& Stevens * For Mescal Brown, et al
619 Jefferson Hwy., Ste. 2H *
Baton Rouge, LA 70806 *

KENNER O. MILLER *
Seale, Smith, Zuber *
& Barnette * For Tamela & Rudolph
Two United Plaza, Ste. 200 * Hudson & Shelter
7550 United Plaza Blvd. *
Baton Rouge, LA 70809 *

MICHAEL T. PULASKI *
ROBERT W. MAXWELL *
JEFF RABORN *
Pulaski, Geiger & LaBorde * For Ford Motor
701 Poydras St., Ste. 4800 * Company
New Orleans, LA 70139-4801 *

Reported by:

CONNIE C. JARREAU, SANDRA M. FIRMIN, and
JEAN FLURRY C.C.R.'s
Certified Court Reporters/Deputy Clerks of Court
Post Office Box 536
New Roads, Louisiana 70760

CONTINUATION OF APPEARANCES:

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& Tullos * For Tamela Hudson &
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Baton Rouge, LA 70821 *
*

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Post Office Box 55490
Metairie, LA 70002
For Cumis Insurance

BRYAN D. FISHER
Ward & Clesi
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Baton Rouge, LA 70802
For Todd Ogden & State Farm Insurance

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For Jeff Walker

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For Jeff Walker

STEVEN C. JUDICE
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For Michael Roth

GERALDINE FONTENOT	*	
Attorney at Law	*	
One American Place	*	For William Kaufman
301 Main Street, Suite 1410	*	
Baton Rouge, LA 70821	*	
THOMAS HIGHTOWER	*	
Attorney at Law	*	
Post Office Box 51288	*	For Shelter Mutual
Lafayette, LA 70505	*	Ins. Soc.
	*	
DONALD MELTZER	*	
Schaneville & Baringer	*	
918 Government St.,	*	For Flynn Foster
2nd Floor	*	
Baton Rouge, LA 70802	*	

Q. Okay. I got it. Well, it sounds – it sounds like you've got your priorities in order over this. Okay. The – besides – besides – let's see. You've got the daughter in Livonia and you've got the grandchild. Any other family members that live with you?

A. No.

Q. Okay. All right. All right. Thanks. If you could pass it on to Mr. Allement. Okay. Mr. Allement, how – how about – what's your transportation situation getting to and from Court and such?

A. It's not a problem.

Q. Not a problem?

A. No, sir.

Q. What – and what's your family situation?

A. Married and got two step-kids.

Q. Okay. Your – I take it then your wife was married before?

A. Yes, sir.

Q. Yes, sir, and you've taken on her two children, and y'al live all under one roof?

A. Yes, sir.

Q. Okay. What – What is the situation with your employment and –

A. It's not a problem.

Q. Okay. How about her employment? Does she – she's a – she's a housewife?

A. No, Sir; she works, too.

Q. Oh, she works, too?

A. Yes, sir.

Q. Okay. What – and what does – what is her work and what is your work?

A. She's a secretary and I'm a machinist.

Q. Okay. You're a machinist here in town and –

A. In Brusly right now.

Q. In Brusly. Okay.

A. Famco.

Q. For – for Amoco?

A. Famco.

Q. Oh, Famco.

A. Famco Enterprise.

Q. A machinist. Okay, and you've been – how long have you been doing that?

A. I worked for my Daddy eight years, and I've been working for them a little over a year.

Q. Okay, and – and your Daddy was a machinist?

Q. Yes, sir; he owns a shop in Baton Rouge.

Q. Okay. Does he own his own personal shop?

A. Yes, sir.

Q. Okay, and Famco, is that – that's – that's an independent business? It doesn't have anything to do with your family, right?

A. No, sir.

Q. Okay. So, does you dad still have a shop?

A. Yes, sir.

Q. Okay, and that's in Baton Rouge?

A. Yes, sir.

Q. Okay, and you've been working for Famco about a year or so?

A. Yes, sir.

Q. And your – and your wife you said was a secretary?

A. Yes, sir.

Q. And that's where?

A. Fire Tech in Port Allen.

Q. Fire Tech in Port Allen. What do they do exactly?

A. Fire extinguishers and things like that. Hoods and smoke detectors and stuff in business places.

Q. Okay. Do you know how long she's been doing that?

A. Six months to a year.

Q. Six months to a year. How about any lawsuits, anything of that sort? Have you – have you ever been involved in any lawsuits –

A. Uh.

Q. – or have you ever sued anybody or been sued?

A. No, sir.

Q. Same with your wife?

A. Not that I know of.

Q. Okay, and I'll ask you, how about your dad? Did he –

A. He had a cow had got out one time, and somebody had hit it, and they had a lawsuit against him.

Q. Okay. All right. Would any of those – I mean, that lawsuit wouldn't change any – your ability–

A. No.

Q. –to serve on this one, I hope. Okay. All right. Let's see, and – and how about you personally, have you ever been involved in a serious automobile accident?

A. No, sir.

Q. Okay. All right. Well, thanks, Mr. Allement. If you'll pass it on to Mr. LeJeune. Okay. Mr. Lejeune, you know – you're starting to learn the drill here. Okay. So, you know –

A. A little bit.

Q. Okay. What's – what's the situation getting to and from the Courthouse?

A. No problem with transportation.

Q. Okay, and – and you – you live how far from –

A. About eight miles from – out of the city.

Q. Okay, and what's your – what is your family situation, Mr. LeJeune?

A. I have a wife and four year old twins. My wife is a housewife; doesn't work.

Q. Okay. No; well, she's a working mother. Ask her that.

A. Correct. Correct. Correct.

Q. Yeah, Twins?

A. Yes, sir.

STATE OF LOUISIANA

PARISH OF POINTE COUPEE

WE, CONNIE C. JARREAU, C.C.R. AND SANDRA M. FIRNIN, C.C.R., within and for the Eighteenth Judicial District Court, Parish of Pointe Coupee, State of Louisiana, do hereby certify, upon our oaths, that the foregoing

is a true and correct transcript of the JURY VIOR DIRE had in this matter on the 20th day of March, 1995, as taken by CONNIE C. JARREAU AND JEAN FLURRY in shorthand notes and complemented with magnetic tape recording, and thereafter reduced to typewriting by CONNIE C. JARREAU AND SANDRA N. FIRMIN.

WE FURTHER CERTIFY that this transcript was completed on the 22nd day of February, 1996.

New Roads, Louisiana, this the 22nd day of February, 1996.

/s/ Connie C. Jarreau
CONNIE C. JARREAU, C.C.R.
Court Reporter/Deputy Clerk

/s/ Sandra M. Firmin
SANDRA M. FIRMIN, C.C.R.
Court Reporter/Deputy Clerk

APPENDIX G

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

AFFIDAVIT

Before Me, the undersigned authority, came and appeared:

Robert E. Kleinpeter

who, upon being duly sworn, deposed and stated:

(1) Affiant is counsel of record for petitioners in the matter entitled "Mescal Brown, *et al.* v. Tamela D. Hudson, *et al.*, Number 26,505, Division "D", 18th Judicial District Court, Parish of Pointe Coupee, State of Louisiana. Petitioners have filed a Motion for New Trial in that matter based in part on newly discovered evidence and jury misconduct.

(2) This affidavit is submitted pursuant to Article 1975 of the Louisiana Code of Civil Procedure which requires a verifying affidavit when a Motion for New Trial is filed on the basis of newly discovered evidence under Article 1972(2) or jury misconduct under Article 1972(3).

(3) Judgment was filed and mailed on December 29, 1995.

(4) On December 28, 1995, an investigator retained by petitioners for the purpose of scheduling post-trial juror interviews contacted Juror No. 94. After that conversation and after reviewing his file, the investigator realized that Juror No. 94 had been the defendant in a

case in which the investigator had rendered services for the injured party's attorney. The investigator informed undersigned counsel of this fact on December 29, 1995. Over the New Year's weekend, undersigned counsel reviewed his *voir dire* notes and discovered that Juror No. 94 had not revealed this fact in *voir dire* despite a specific question directed to him. On January 2, 1994, counsel obtained certified copies of the suit record involving Juror No. 94. This was the first day the records could be obtained due to closure of the Clerk's office in West Baton Rouge Parish for the New Year's weekend.

FURTHER APPEARER SAITH NOT.

/s/ Robert E. Kleinpeter
Robert E. Kleinpeter

Supreme Court, U.S.
FILED
APR 8 1998
CLERK

No. 97-1651

In The

Supreme Court of the United States

October Term, 1997

MESCAL BLANCHARD BROWN,

Petitioner,

v.

FORD MOTOR COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The Louisiana State Supreme Court

BRIEF IN OPPOSITION

MICHAEL J. O'REILLY
Counsel of Record
FORD MOTOR COMPANY
1500 Parklane Towers West
Dearborn, Michigan 48126
(313) 845-5263

ROBERT W. MAXWELL
JULIANNE T. ECHOLS
PULASKI, GIEGER & LABORDE
Suite 4800 – One Shell Square
New Orleans, Louisiana 70139
(504) 561-0400

Counsel for Ford Motor Company

May 1998

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

13 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should grant a petition for certiorari to review arguments under the Fifth and Fourteenth Amendment relating to a juror's incorrect answer during *voir dire,* where Petitioner did not assert such arguments in the Louisiana courts.

2. Whether this Court should grant a petition for certiorari where the result would be the same (a motion for new trial based on a juror's inaccurate answer during *voir dire* would be denied) under the authority on which Petitioner relies, *McDonough Power Equipment, Inc. v. Greenwood,* 464 U.S. 548 (1984), or under controlling Louisiana authority.

LISTING OF PARENT COMPANIES AND SUBSIDIARIES PURSUANT TO RULE 29.6

Respondent, Ford Motor Company has no parent corporation. The following is a list of domestic and foreign companies in which Ford Motor Company owns an equity interest of at least 10% but less than 100%.

The Hertz Corporation

Argentina
Invercred Compania Financiera S.A.

Australia
Ford Motor Company of Australia Limited

Belgium
Ford Motor Company (Belgium) N.V.

Brazil
Autolatina Comercio e Participacoes Financerias Ltd.

Denmark
Ford Motor Company A/S

Finland
Oy Ford Ab

Germany
Ford Werke-Aktiengesellschaft

Holland
Ford Nederland B.V.

Japan
Mazda Motors Corporation

Korea
Ford Motor Company of Korea

LISTING OF PARENT COMPANIES AND SUBSIDIARIES PURSUANT TO RULE 29.6 – Continued

Norway
Ford Motor Norge A.S.

New Zealand
Ford Motor Company of New Zealand Limited

Singapore
Ford Motor Company Private Limited

Switzerland
Ford Motor Company (Switzerland) S.A.

Vietnam
Ford Vietnam Limited

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LISTING OF PARENT COMPANIES AND SUBSIDIARIES PURSUANT TO RULE 29.6 ii

TABLE OF AUTHORITIES v

RESPONDENT'S BRIEF IN OPPOSITION 1

OPINION BELOW 1

COUNTERSTATEMENT OF THE CASE 1

REASONS WHY THE PETITION SHOULD BE DENIED 3

I. THIS COURT SHOULD NOT GRANT CERTIORARI TO REVIEW PURPORTED FIFTH AND FOURTEENTH AMENDMENT ARGUMENTS NOT RAISED IN THE STATE COURT 3

II. THE RESULT WOULD BE THE SAME UNDER THE AUTHORITY ON WHICH PETITIONER RELIES, *McDONOUGH POWER EQUIPMENT, INC. v. GREENWOOD*, 464 U.S. 548 (1984), AS IT WAS UNDER CONTROLLING LOUISIANA AUTHORITY 4

CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES

Cardinale v. Louisiana, 394 U.S. 437 (1969) 3

Exxon Corp. v. Eagerton, 462 U.S. 176 (1983) 3

Lee v. K-Mart Corp., 483 So. 2d 609 (La. App. 3d Cir. 1985), *writ denied*, 484 So. 2d 661 (La. 1986) 6

McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548 (1984) 3, 4, 5, 6

Temple v. Liberty Mutual Ins. Co., 330 So. 2d 891 (La. 1976) 7

United States v. Scott, 854 F.2d 697 (5th Cir. 1988) .. 3, 4, 5

Uriegas v. Gainsco, 663 So. 2d 162 (La. App. 3d Cir.), *writ denied*, 664 So. 2d 458 (1995) 5

Vallo v. Gayle Oil Co., 646 So. 2d 859 (La. 1994) 3

White v. Louisiana Western Ry. Co., 140 So. 486 (La. 1932) 4

Vezina v. Theriot Marine Service, Inc., 610 F.2d 251 (5th Cir. 1980) 5, 6

Yee v. City of Escondido, 503 U.S. 519 (1992) 3

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Ford Motor Company (Ford) respectfully requests that this Court deny the Petition for a Writ of Certiorari seeking review of the Louisiana Supreme Court's denial of Petitioner's Application for Writs of Certiorari and Review.

OPINION BELOW

The opinion of the Louisiana Court of Appeal for the First Circuit is reported at 700 So. 2d 932 and is reprinted in Petitioner's Appendix at 4. The order of the Louisiana Supreme Court denying Petitioner's Application for Writ of Certiorari and Review is unreported and is reprinted in Petitioner's Appendix at 26.

COUNTERSTATEMENT OF THE CASE

Petitioner was seriously injured when a trailer carrying a pontoon boat became detached from the truck that was towing it, crossed over the center line, and crashed into Petitioner's 1984 Lincoln Town Car. Portions of the pontoon boat intruded into the Lincoln at the driver's window, exactly where Petitioner was seated.

Petitioner sued numerous parties, ultimately settling during trial with all parties other than Ford. At trial against Ford, Petitioner alleged that the Town Car's seat belt was defective in design because it allowed slack to develop in the seat belt, thereby allowing Petitioner to move forward toward the pontoon boat. Ford presented

substantial evidence that the pontoon boat struck Petitioner in her normal seating position before she had time to move forward. The jury found in favor of Ford on all counts.

During jury selection, juror Mark Allement was asked whether he had ever been sued and he answered in the negative. Following trial, an investigator hired by Petitioner's counsel discovered that Mr. Allement had in fact been sued, over four years earlier, in connection with an automobile accident in which he collided with a youth on a bicycle. The suit was handled by Mr. Allement's insurer and was settled by the insurer, without trial, about nine months after it was filed. Mr. Allement's sole involvement in the suit was his appearance for a routine deposition.

Petitioner's assertions concerning Mr. Allement's attitudes and alleged bias are sheer speculation, not supported by anything in the record. The only information established below is that Mr. Allement's statement that he had not been sued was incorrect.

Petitioner moved for a new trial, citing juror misconduct and several other alleged errors. The motion was denied and Petitioner appealed to the Louisiana Court of Appeal. Petitioner did not cite the United States Constitution, and did not cite any federal authority, at either the trial court or the Court of Appeal. The Court of Appeal affirmed. One judge disagreed with the majority's conclusion on juror misconduct, but nevertheless concurred with the majority in the result, on the basis that his independent evaluation of the entire record showed that Petitioner had failed to prove the existence of a defect.

Petitioner then filed an Application For Writs of Certiorari and Review in the Louisiana Supreme Court. Petitioner's Application cited two federal decisions, *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), and *United States v. Scott*, 854 F.2d 697 (5th Cir. 1988), but did not contain any reference to the Fifth or Fourteenth Amendments. The Louisiana Supreme Court unanimously denied Petitioner's Application without opinion (Justice Lemmon not participating).

REASONS WHY THE PETITION SHOULD BE DENIED

I. THIS COURT SHOULD NOT GRANT CERTIORARI TO REVIEW PURPORTED FIFTH AND FOURTEENTH AMENDMENT ARGUMENTS NOT RAISED IN THE STATE COURT.

This Court will not decide federal constitutional issues raised here for the first time. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). Further, this Court will not review constitutional issues presented to a state Supreme Court for the first time on appeal. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983); *Yee v. City of Escondido*, 503 U.S. 519, 532 (1992).

Louisiana courts follow a similar rule. "Issues not submitted to the trial court for decision will generally not be considered by the appellate court on appeal." *Vallo v. Gayle Oil Co.*, 646 So. 2d 859, 863 (La. 1994).

In this case, Petitioner made no reference to any constitutional issue or to any federal authority at either the trial court or the Louisiana Court of Appeal. This alone is fatal to her petition to this Court.

In her Application to the Louisiana Supreme Court, Petitioner for the first time cited two federal decisions, *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), and *United States v. Scott*, 854 F.2d 697 (5th Cir. 1988), but still did not make any reference to the Fifth or Fourteenth Amendments.

The Louisiana Supreme Court denied Petitioner's Application by simple order, with no indication that any constitutional issues were addressed. Petitioner in some places attempts to gloss over this fact by referring to the "opinion" of the Louisiana Supreme Court, but in other places she acknowledges that "there was no decision on that matter." Petition at 6. In any event, denial of a writ of certiorari does not constitute a decision on the merits. *White v. Louisiana Western Ry. Co.*, 140 So. 486, 488 (La. 1932).

Because Petitioner did not raise any constitutional issue at any level in the state court, and because the state court therefore did not review any constitutional issue, this Court should not consider such issues for the first time here, and the petition for certiorari should be denied.

II. THE RESULT WOULD BE THE SAME UNDER THE AUTHORITY ON WHICH PETITIONER RELIES, *McDONOUGH POWER EQUIPMENT, INC. v. GREENWOOD*, 464 U.S. 548 (1984), AS IT WAS UNDER CONTROLLING LOUISIANA AUTHORITY.

Even if Petitioner had preserved constitutional arguments, and even if it is assumed that those arguments were applicable to this case, no relief would be warranted.

Under Louisiana law, a verdict will be set aside for jury misconduct if the moving party proves that the level of behavior was of such a grievous nature as to preclude the impartial administration of justice. *Uriegas v. Gainsco*, 663 So. 2d 162 (La. App. 3d Cir.), *writ denied*, 664 So. 2d 458 (1995).

Federal law imposes a similar, if not heavier, burden on the party seeking to set aside a verdict. In *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), plaintiff sought a new trial on the basis that a juror had incorrectly stated that no family member had been seriously injured, when in fact the juror's son had sustained such an injury. The federal district court denied the motion for new trial and the Tenth Circuit reversed. In reversing the Tenth Circuit, this Court held that a party seeking to obtain a new trial in such a situation must first demonstrate that a juror failed to answer accurately a material question on *voir dire*, and then further show that a correct response would have provided a basis for a challenge for cause. *McDonough*, 464 U.S. at 556. This Court stressed that a party is not entitled to a perfect trial. *Id.* at 553. Similarly, in *Vezina v. Theriot Marine Service, Inc.*, 610 F.2d 251 (5th Cir. 1980) (cited by Petitioner), a juror's failure to reveal that a civil action *was currently pending against her* did not result in denial of right to fair trial.

In contrast, the only case that Petitioner cites which supports new trial based on a juror's inaccurate answer is *United States v. Scott*, 854 F.2d 697, 700 (5th Cir. 1988), which expressly applied a stricter standard to a criminal proceeding, granting a new trial where a juror deliberately failed to disclose that his brother was a sheriff who

had been involved in the investigation of the *very crime in question in the trial*, a fact that clearly would have supported a challenge for cause.

Here, the denial of Petitioner's motion for new trial did not result from any difference between Louisiana law and federal law as expressed in *McDonough*. Rather, Mr. Allement's inaccurate answer, absent other evidence, was neither "grievous" (the Louisiana standard), nor was it a basis of excusing a juror for cause (*McDonough, Vezina*). In an attempt to satisfy the cause requirement in the *McDonough* rule, Petitioner misstates Louisiana law. She asserts that *Lee v. K-Mart Corp.*, 483 So. 2d 609 (La. App. 3d Cir. 1985), *writ denied*, 484 So. 2d 661 (La. 1986), establishes that involvement in prior litigation establishes a basis for a challenge for cause. In fact, the basis for the challenge in *Lee* was not the prior litigation experience, but rather the juror's "responses [that] show he was biased and could not be impartial." 483 So. 2d at 611. Petitioner also confuses his *speculation* about Mr. Allement's attitude and motivation with the *facts* in the record. If Mr. Allement had answered accurately, Petitioner might have exercised a peremptory challenge, but that is irrelevant; *McDonough* expressly limits a new trial to situations that would support a challenge for cause.[1]

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[1] Petitioner asserts that an accurate answer by Mr. Allement would have led to a confession of bias, which would have supported a challenge for cause. But Petitioner elsewhere asserts that Mr. Allement deliberately provided a false answer because he wanted to stay on the jury so that he could act on a purported bias against plaintiffs. If Mr. Allement was indeed such a schemer, he certainly would not have made a concession of bias that would be necessary to support a challenge for cause.

Finally, even if the trial court's denial of new trial was held to be erroneous, the result here would not change. Under Louisiana law, where some legal error interdicts the jury verdict, the Court of Appeal must make its own independent review of the record and determine a preponderance of the evidence. *Temple v. Liberty Mutual Ins. Co.*, 330 So. 2d 891 (La. 1976). Judge Fogg of the Louisiana Court of Appeal, who dissented from the majority's opinion on the juror issue but concurred in the result, performed an independent review and concluded that Petitioner failed to prove the existence of any defect. There is no reason to believe that other judges of the Court of Appeal would conclude otherwise.

CONCLUSION

For these reasons, Respondent Ford Motor Company respectfully requests that Petitioner's petition for certiorari be denied.

Respectfully submitted,

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